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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 229

LAR DALY,

Petitioner,

vs.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner Pro Se.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No.

LAR DALY,

Petitioner,

vs.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, *pro se*, Lar Daly, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, and that upon consideration, the Court assume jurisdiction of the case for a decision on the merits.

REFERENCE TO OPINION IN THE COURT BELOW.

The opinion of the Court of Appeals, 7th Circuit, sought to be reviewed is contained on Page 1a herein as Appendix I.

STATEMENT OF THE GROUNDS OF JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was entered on January 12, 1961. (Appendix II, p. 6a)

A Petition for Rehearing was denied on February 13, 1961. (Appendix III, p. 7a)

An Order, granting Petitioner an extension of time in which to file his Petition for Certiorari to and including June 13, 1961, was signed by Mr. Justice Clark on May 12, 1961. An Order, granting Petitioner a further but final extension of time in which to file his Petition for Certiorari to and including July 13, 1961, was signed by Mr. Justice Clark on June 12, 1961.

The statutory provisions conferring jurisdiction on the Court of Appeals to review orders and directives of the Federal Communications Commission are contained in 47 U.S.C., Sec. 402(a); 5 U.S.C., Sec. 1001-1011; and 5 U.S.C., Sec. 1031-1042.

QUESTION PRESENTED FOR REVIEW.

Did the Court of Appeals err in sustaining the Commission's obvious inconsistency in failing to apply its interpretation of its own rule to the one and only "issue" which the Commission, in its two (2) adverse decisions against Petitioner, declared to be the crux of the matter in dispute between Petitioner and Columbia Broadcasting System, (*viz.*, the TV Newscasts issue)?

STATUTES AND REGULATIONS INVOLVED.

NONE. Petitioner agrees as stated in the opinion of the Court below that, *in the instant case*, where no actual statutory construction is involved, but merely the inter-

pretation of a Commission standard known as the "Editorializing Fairness" concept, "the Federal Communications Commission's own interpretation of its rule is the ultimate criterion and is entitled to controlling weight, unless it is plainly erroneous or inconsistent with the rule"; *but, Petitioner maintains that the Commission's two (2) adverse decisions against Petitioner were plainly erroneous and inconsistent with the Commission's rule, and that the Court below also plainly erred in upholding and affirming the Commission's error and inconsistency.*

STATEMENT OF MATERIAL FACTS OF THE CASE.

On February 19, 1959, Petitioner, after a full and fair hearing on the merits, won a decision from the Federal Communications Commission that "TV Newcasts" were to be considered as coming within the obligatory provisions of Sec. 315(a) of the Communications Act of 1934, as amended, thus requiring Columbia Broadcasting System's owned and operated Chicago, Illinois television station (WBBM-TV), as well as the other major TV networks' Chicago stations and an independent TV station, to afford Petitioner "equal time" in use of their facilities to reply to his two (2) Primary Election opponents as a candidate for the Democratic and Republican political party nominations for the office of Mayor of the City of Chicago, Illinois.

The other major TV network's (NBC) Chicago station involved in the dispute promptly complied with the Commission's mandate and, on February 20, 1959, timely afforded Petitioner equal opportunities in use of its facilities for the February 24, 1959 Municipal Primary Election held in Chicago, Illinois.

Columbia Broadcasting System, at the direction of its top administrative official in New York City, ordered its Chicago station not to comply with the Commission's mandate, contrary to the Commission's specific regulations thereto, and, consequently, denied Petitioner equal opportunities in respect to the free and equal TV time for reply as guaranteed by statute. Instead, in the A.M. of the very next day, February 20, 1959, Columbia Broadcasting System filed a "Petition for Reconsideration and Reversal of Order" with the Commission, which action naturally barred any possibility of Petitioner receiving his "equal time" statutory right before the Chicago Primary Election for Mayor held on February 24, 1959.

Beginning with the date of February 19, 1959, the entire broadcasting industry, under the self-proclaimed, undisputed and unchallenged leadership of the President of Columbia Broadcasting System (hereinafter referred to as CBS) launched the most massive, nation-wide, one-sided propaganda campaign of psychological terror, half-truth, distortion and false innuendo against Section 315 in its entirety, utilizing all possible news and creative public opinion media, such as the TV and radio networks and stations, daily and weekly newspapers, weekly and monthly magazines, motion picture newsreels, lecture forums of civic, social, service and religious groups, faculty and invited guest speakers on the campuses of colleges and universities, and even utilized the office of the President of the United States, unfairly, to further its cause of complete abolishment of Section 315.

The entire broadcasting industry's serried assault against the very concept of "equal time" for political candidates on TV and radio was based on what the industry itself designated as "the Lar Daly case", "the Lar Daly

decision", "the Lar Daly ruling", and "the Lar Daly verdict" by the Commission in its February 19, 1959 mandate. It was keyed to the usual, "good for ready sympathy" Constitutional theme of "denial of free speech and due process", and specifically employed as a weapon of psychological terror directed to the seven (7) members of the Commission, seeking to force a reversal of the Commission's February 19, 1959 ruling in Petitioner's favor.

The February 19, 1959 decision of the Commission was concerned with five (5) separate incidents in Chicago TV Newscasts, in which Petitioner's two (2) opponents for Mayor of Chicago were afforded free use of CBS' Chicago, and other stations', TV facilities. In three (3) of the incidents, comprising about 90% of the free time involved, the Commission voted 7 to 0 (unanimously) in Petitioner's favor. In the remaining two (2) incidents, the Commission voted 4 to 3 in Petitioner's favor. In the nearly four (4) months of argumentative pleadings before the Commission on CBS' and the other networks' "Petitions for Reconsideration and Reversal" of the Commission's February 19, 1959 ruling, *no other issue but the "TV Newscasts issue" was even remotely referred to, directly or indirectly, either by the networks or Petitioner.* Petitioner, practically alone and unaided, carried on the fight before the Commission to sustain and reaffirm its original February 19, 1959 ruling on the "TV Newscasts issue".

During the four (4) months interim, the networks and their regimented news media allies and creative public opinion auxiliaries, with incessant demogogic wails and lamentations of denial of free speech and due process, prevailed upon certain Senators and Representatives in the Congress to introduce legislation exempting, not only Newscast programs from the obligatory provisions of the then existent Section 315(a), but all other categories of

TV and radio news programs, which, for all practical purposes, actually destroyed the whole concept of "equal time" in its entirety. For the broadcasting industry, and especially the networks, it was a golden opportunity to "get everything while the getting is good", and, utilizing what they termed as the "incredible", "idiotic", "senseless", "insidious", and "ridiculous" Commission ruling in the "Lar Daly case", applicable to the "TV Newscasts issue", as a battering ram before the Congress and the American public generally, they succeeded in their prime objective of "amending" Section 315(a) out of existence in September, 1959. The "exemptory" provisions to Section 315(a) of September, 1959 were achieved by a voice vote of 142 to 70 in the lower House of the Congress, *with less than half of the membership present and voting.*

The "Kill Equal Time" forces, and specifically the CBS network, accorded Petitioner what it is presumed they considered to be the dubious honor of being the "triggerman" of the entire "equal time" controversy, because of his personal "directly involved principal" status in the matter, resulting in the Commission's original February 19, 1959 ruling in Petitioner's favor as regards the "TV Newscasts issue". No reasonable and unbiased observer, having only a cursory knowledge of the facts inherent in the Commission's February 19, 1959 ruling on the "TV Newscasts issue", would deny that, in the following four (4) month interim wherein the networks strove with might and main to force a reversal of the Commission's original ruling, only the "Kill Equal Time" side of the controversy was adequately presented to the American people, while the "Save Equal Time" side was deliberately muzzled and silenced, and the impression generally created that it didn't even exist.

On June 15, 1959, the Commission issued its "Interpretative Opinion" sustaining and affirming "in toto" its February 19, 1959 original ruling on the "TV Newscasts issue", and, in effect, denying CBS' and the other networks' "Petition for Reconsideration and Reversal of Order". The Commission's "Interpretive Opinion" was contained in specific and minute detail, and comprised fifty-five (55) pages of single-spaced, typewritten text, which effectively and completely demolished the networks' arguments seeking to reverse the Commission's original February 19, 1959 ruling in Petitioner's favor on the "TV Newscasts issue". If the broadcasting industry and other news media had adhered to the basic doctrine of fairness, and actually "presented both sides of a controversial issue of public importance" on and through their respective electronic and mechanical facilities, especially as to the salient points contained in the Commission's June 15, 1959 "Interpretive Opinion", it can be reasonably stated that at least a fair possibility existed wherein the American people would substantially express their opinions in favor of the "Save Equal Time" position, and their representatives in the Congress might not have voted to "amend equal time to death" as they did. As it was, the thunderous "blackout by silence" of the "Save Equal Time" side of the controversy effectively slumberized the American people so as to evoke no perceptible response from them and consequently dubbing them as truly deserving of the designation, so far as the "Equal Time" issue was concerned, as being "victims of invincible ignorance."

On July 26, 1959, the CBS network, apparently realizing that the organized, one-sided, massive, nation-wide propagandizing in favor of the "Kill Equal Time" position might boomerang in its face, and purportedly to create the illusion that "both" sides of the dispute were presented on its networks' facilities, carried an "editorializ-

ing" program in opposition to the Commission's February 19, 1959 ruling in the "Lar Daly case" as regards the "TV Newscasts issue", and the "equal time" obligation applicable to all types of news programs on its TV and radio networks, which program CBS entitled as "SECTION 315—BEHIND THE NEWS". At the conclusion of the program, CBS announced that an "opposition" reply program to the CBS position would be presented over its network facilities on the following week, August 2, 1959.

The July 26, 1959 CBS "editorializing" program began with a résumé of the "Lar Daly case" and the Commission's decision thereto on the "TV Newscasts issue". The first five (5) pages of the CBS transcript of the program deal with the "Lar Daly case". It is obvious the Commission's decision on the "TV Newscasts issue" initiated CBS' scheduling the program. Without the "Lar Daly case" there would have been no "Equal Time" question existent throughout the country for six (6) months. There would have been no Congressional hearings resulting in the practical emasculation of the "equal time" concept of 32 years duration in Section 315(a) and its predecessor, the Radio Act of 1927. All would have been quiet and serene on the "Equal Time Front". The networks, led by CBS, would have probably made their usual Congressional effort to abolish or amend Section 315, and undoubtedly would have run into the usual Congressional stone wall of yawning disapproval. The Commission's startling and fearless February 19, 1959 decision in the "Lar Daly case" changed all that. CBS, sulking and skulking like the proverbial oft-frustrated tiger denied the meat of its expected kill, leaped to the occasion with a monstrously sanctimonious roar of Constitutional pain, screaming that its "free speech and due process" jugular vein had been ripped wide open by the un-democratic, un-American, zombi-like decision of the Commission's members in the

"Lar Daly case" concerning the "TV Newscasts issue". This was the reaction of CBS, the other networks, and the entire "CBS brow-beaten" broadcasting industry to the Commission's ruling, *after* they had been accorded their full and fair "day in court" before the Commission on the "TV Newscasts issue", certainly to a degree far greater than Petitioner, who was forced to make all of his arguments before the Commission by telegraphic pleadings from Chicago, Illinois.

CBS, naturally, realizing the golden opportunity at hand to "murder" Section 315 by amendatory legislation during the deliberately provoked uproar of its own creation, devoted a portion of its July 26, 1959 "editorializing" program to four (4) other categories of news programs it wanted exempted, besides newscasts, from what CBS described as the "suffocating and strangulating straitjacket" known as Section 315. These were: news interview programs, news documentary programs, news on-the-spot programs, and news panel programs. "Get while the getting is good", figured CBS, "there may never be another chance like this." CBS could just as well have thrown in the "kitchen sink and the old water bucket" for good measure. But one undeniable fact was obvious and paramount, the "TV Newscasts issue" must be the prime and dominant subject for discussion on the CBS "editorializing" program, else the program had no logical reason for being in the first place. The four (4) other categories of news programs were merely ancillary and of minor importance to the "newscasts" program category, against which the awesomely powerful propagandistic might of the full CBS network sledge-hammer must be wielded with full force.

And so it was. The "TV Newscasts issue", generated by the Commission's decision in the "Lar Daly case" was the

"key" theme, the basic subject, the "anchor" of thought, the very gravamen, so to speak, of the July 26, 1959, CBS "Editorializing" program, as the CBS transcript of the program will conclusively show.

In August, 1959, CBS and the other networks, filed a Petition for Review in the U. S. Court of Appeals for the District of Columbia Circuit, seeking to overturn the Commission's "Interpretive Opinion" of June 15, 1959, in the "Lar Daly case" on the "TV Newscasts issue". Respondents were the U.S.A. and the F.C.C. Petitioner secured leave of the Court to enter the case as Intervenor. Here, providentially, was an unexpected opportunity to have the second highest Court in the land rule on the actual constitutionality of the CBS-initiated amendatory legislation now before the Congress. In their Petitions for Review, CBS and the other networks, figuratively alleged that two (2) Constitutional "murders" had been committed by the Commission in its two (2) decisions in the "Lar Daly case" on the "TV Newscasts issue", *viz.*, the "murders" of free speech in the First, and that of due process in the Fifth Amendment to the U. S. Constitution. Suddenly, and advancing as its reason an excuse which Petitioner believed was a travesty and mockery of its sincerity and honest intentions in the first place, CBS withdrew its Petition for Review, as did its companion networks, *after September 3, 1959,* the date on which final Congressional action was completed amending Section 315(a) to death as far as the whole concept of "equal time" was concerned. Obviously, CBS had to go through the motion of filing the Petition for Review merely to save face, by backing up its forsworn promise to carry the fight to reverse the "Lar Daly decision" on the "TV Newscasts issue" to the highest court in the land if necessary. Just as obviously, in Petitioner's belief, CBS, *after* it had secured the "kill equal time" amendatory legislation

to Section 315(a) from the Congress, feared a pre-legislative judicial determination on the constitutionality of the pending amendatory legislation by the second highest court in the land.

On July 26, 1959, at 9:00 A.M., fully eight (8) hours *before* the CBS "editorializing" program was put on the air at 6:30 P.M. the same day, Petitioner made telegraphic request of CBS to deliver the "opposition" reply, scheduled for August 2, 1959. In his request, Petitioner cited the fact of his possessing "directly involved principal" status on the "TV Newscasts" issue, and the only person who could possibly claim such controlling status as far as the rules and regulations of the Commission's own guiding authority in the matter was concerned. Four (4) days later, by regular 4¢ stamped mail from New York City, CBS notified Petitioner that all arrangements as to "opposition" reply spokesmen for the forthcoming CBS-arranged, August 2, 1959 "opposition" reply program had been completed, and, therefore, CBS must refuse Petitioner's request.

On August 2, 1959, the CBS-arranged, supposed "opposition" reply program was presented on the CBS network facilities. CBS selected as "spokesmen" three (3) persons. One was a member of the Socialist Labor party in New York City. The second was a member of the New York State Liberal party in New York City. The third was an Assistant Professor of Political Science at a small college in the State of Maryland. CBS consistently describes members of such political groups as "miniscule", "fringe", "minor", "odd-ball", "crack-pot", etc., elements in the American political scene. As is well-known, CBS is fast and loose with its applied political descriptives to all non-conformist politicians; dismisses the historical fact that many giants of American politics would have origin-

ally been eligible for the CBS-designated "tar stick"; and unwisely fails to perceive the possibility, no longer remote in the fast-changing vicissitudes of present political times, that the "shoe of political authority" in America might some day soon "be on the foot" of one or more of the type of politicians which CBS so superficially relegates to the political nut-barrel. For the record, Petitioner has never been identified with such CBS-designated political groups, and has sought political office only as a candidate of what CBS describes as the "major" political parties, *viz.*, the Republican and Democratic parties.

Obviously, the CBS maneuver in selecting so-called "minor" political party members to make the "opposition" reply to the CBS position was an unfair and unprincipled, and undoubtedly successful, attempt to create the impression among the American people that the cause of "Save Equal Time" was defended and upheld by only a small fraction of the populace as a whole.

Petitioner was unable to view or hear the supposed "opposition" reply program of August 2, 1959. He requested a transcript of the program from CBS and received same. Upon examination, Petitioner found that two (2) of the three (3) CBS-selected, "opposition" reply spokesmen agreed in toto with CBS' position on the "TV Newscasts issue", *i.e.*, that TV newscast programs *should* be exempted from the obligatory "equal time" provisions of the then existent Section 315. This undeniable fact rendered the August 2, 1959, CBS-arranged, supposed "opposition" reply program null and void in its entirety. No amount of subsequent CBS attempt at explanation could obviate the ineradicable position of the two (2) supposed "opposition" reply spokesmen on the basic "important public question of a controversial nature", *viz.*, the "TV Newscasts issue". In effect, CBS, wittingly or no,

had utilized the ruse of "pretended adversaries" as purportedly genuine spokesmen for the "opposite" side of the controversy on the "TV Newscasts issue", in the CBS-arranged, August 2, 1959 supposed "opposition" reply program. Every cause must be a "versus". Every dispute at issue must have a "pro" and a "contra" position. These elemental requirements were lacking on the August 2, 1959, supposed "opposition" reply program, as CBS, the Commission, and the Court below have conceded by stipulation, in respect to the "TV Newscasts issue". The American public *heard only one side* of the controversial "TV Newscasts issue" on the network facilities of CBS. The "other side" *was not heard*, fully and fairly, as required by the Commission's controlling standard. On August 2, 1959, in the supposed, CBS-arranged, "opposition" reply program, CBS patently failed to provide a "fair and balanced presentation of an important public issue of a controversial nature", as required by the controlling standard of the Commission in respect thereto.

On July 28, 1959, Petitioner filed his "Petition for Declaratory Ruling Forthwith", with the Commission, requesting it to issue an "order" directing CBS to afford Petitioner the opportunity to present the true "opposition" reply to the CBS "editorializing" position on the basic controversial issue in dispute, *viz.*, the "TV Newscasts issue." On August 18, 1959, the Commission (by decision of one member) refused Petitioner's request, but holding that (in the last paragraph therein) " . . . *the newscast question, not Lar Daly, is the controversial issue* . . ." (underlining by Petitioner)

On September 21, 1959, Petitioner filed his "Petition for Reconsideration and Reversal of Order" with the Commission, requesting it to rescind its August 18, 1959 adverse decision against Petitioner. On March 24, 1960,

The Commission (by decision *en banc*) refused Petitioner's request, but again holding (in the fourth paragraph therein) ". . . *that in the instant case, it was the* ***newscast question*** ***rather than you which was the controversial issue*** . . ." (underlining by Petitioner)

On May 23, 1960, Petitioner filed his "Petition to Review Order of the Federal Communications Commission" with the Court below. The Petition failed. The Court below subsequently denied a Petition for Rehearing. Petitioner now seeks review by this Court on Certiorari action to the Court below

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT AND ASSUMPTION OF JURISDICTION BY THIS COURT FOR DECISION ON THE MERITS OF THIS CASE.

1. The Court below has so far sanctioned the departure of a Federal regulatory agency from the accepted and usual course of quasi-judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court below was aware that, in all the pleadings before the Commission between Petitioner and CBS, no other *matter but the "TV Newscasts issue"* was advanced for adjudication by the Commission.

The Court below was aware that the Commission, in both of its adverse decisions against Petitioner, definitely and specifically stated "*the newscast question . . . is the issue*", and did not state, anywhere in its two (2) decisions that "News interview programs"; "News documentary programs"; "News on-the-spot programs"; and "News panel programs" were also "issues" or even "parts of issues" to be included and considered for decision by the Commission.

For the Court below to have also included the four (4) other categories of news programs as being part of the basic "issue" in dispute, figuratively, "wrecked" *a priori any* chance of Petitioner's Petition for Review being granted by the Court below; and unjustly and unfairly accorded CBS an evolution in the Commission's standard of "Editorializing Fairness", which CBS would not have been entitled to in the first place, because such four (4) other categories of news programs had never even once been mentioned in the proceedings before the Commission involving Petitioner and CBS.

2. The Court below plainly erred in sustaining and affirming the erroneous action of the Federal Communications Commission in failing to apply the interpretation of its own rule to the one basic issue in dispute before the Commission, viz., the *"TV Newscasts issue"*, which the Commission in two (2) separate rulings of six (6) months interval, definitely stated to be the sole issue at bar, *and no other*, between Petitioner and Columbia Broadcasting System.

What sole and exclusive matter did CBS and Petitioner concern themselves with in their proceedings before the Commission? Was it not, *only* the *"TV Newscasts issue", and no other category or type of news program?*

What sole and exclusive matter did the Commission, in two (2) separate and definite decisions, state to be the *only issue* in question before it? Was it not, *only* the *"TV Newscasts issue", and no other category or type of news program?*

What was the specific "interpretation" of its own rule by the Commission, made in two (2) separate decisions, concerning the CBS-Lar Daly dispute? It was verbatim, as follows:

> ". . . Inasmuch as CBS presented several spokesmen on its August 2 program, all of whom appear qualified to oppose the views *expressed by Mr. Stanton*, it would appear that CBS has fulfilled its obligation to provide a *"fair and balanced presentation of an important public issue of a controversial nature."*

It must be noted here that Mr. Stanton's remarks consumed only five (5) minutes of the program's thirty (30) minutes duration, and, that Mr. Stanton made no reference to the "TV Newscasts issue" in his remarks, but concentrated mainly on platitudinous references to the Constitutional guarantee of "free speech", and particu-

larly, to the absolute applicability of its provisions, unchained and unrestrained, to the news programs of the broadcasting industry. In retrospect, it is most interesting to observe that Mr. Stanton, the unabashedly outspoken crusading champion of "free speech" for the broadcasting industry, is likewise the undisputed, self-proclaimed leader of the "Kill Equal Time" forces sponsoring the death-like amendatory legislation to Section 315(a), of extremely doubtful constitutionality, which, for all practical purposes, denies "free speech", represented by "equal time for reply", to practically all political candidates, unless provided by the sufferance of the likes of Mr. Stanton, exercising what he and the rest of the broadcasting industry's executives most humbly term their right to "utilize our fair and unbiased editorial judgment as to any political candidate's newsworthiness."

Did the Commission apply its "interpretation" of its own rule to the one sole and exclusive "issue", which the Commission itself twice stated was "the" controversial issue at bar between CBS and Lar Daly? The Commission did *not*, for if it did, then the fact that two (2) of the supposed "opposition" reply spokesmen on the August 2, 1959, CBS-arranged program agreed substantially with the CBS position on the "*TV Newscasts issue*", and did *not* oppose the CBS position as they were required to do in justice and common-sense, would have forced the Commission to rule in Petitioner's favor in the first instance, and impelled CBS to allow Petitioner to make the true "opposition" reply to CBS' position on the "TV Newscasts issue", and thus, CBS would have then truly fulfilled its obligation "to assure a fair and balanced presentation of an important public issue of a controversial nature."

"The obvious is self-evident-the thing itself speaks". So aptly stated a renowned Justice of the North Carolina Supreme Court. That imperishable truism applies to Petitioner's cause "squarely on all fours" in the instant case.

The Petition for Writ of Certiorari should be granted, and Petitioner prays this Court to assume jurisdiction for consideration on the merits of this case, and then issue judgment in Petitioner's favor as stated in the "Relief Requested" in Petitioner's "Petition for Reconsideration and Reversal of Order", Paragraph (a) thereto, filed with the Commission on September 21, 1959. (Appendix VI, p. 13a)

Respectfully submitted,

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July 12, 1961

APPENDIX I.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

SEPTEMBER TERM, 1960—JANUARY SESSION, 1961

No. 13030

LAR DALY, *Petitioner*, v. UNITED STATES OF AMERICA, and THE FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.	Petition for Review of an Order and Directive of the Federal Communications Commission.

January 12, 1961

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

KNOCH, *Circuit Judge*. Petitioner asks this Court to determine that the Federal Communications Commission's "Original Ruling of August 18, 1959, and Reaffirmation Directive of March 24, 1960, are unlawful, erroneous and invalid and should be enjoined, set aside, annulled, and suspended."

The Federal Communications Commission had refused Petitioner's request for an

> "'Interpretive Opinion' strongly recommending that Columbia Broadcasting System, and specifically its chief administrative officer, Frank Stanton, afford

> Petitioner (Lar Daly) free 30 minutes use of its facilities, equal to that utilized by Frank Stanton and other CBS personnel on July 26, 1959, to present to the American people a *genuine* explanation of the 'other side' of the controversial 'TV-Newscast' issue, wherein CBS will thus truly and actually 'fulfill its obligation' of providing a fair and balanced presentation of an important public issue of a controversial nature."

Petitioner argues that such a "recommendation" from the Commission, although not an "order", would not be disregarded by CBS because its individually owned and operated stations hold their licenses to broadcast subject to the Commission's continued approval.

The background to this cause may be briefly outlined as follows: In February, 1959, the Commission had ruled that Section 315(a) of the Communications Act of 1934, as amended, [47 U.S.C.A. §315(a)] which required equal opportunities on radio and television for all legally qualified candidates for public office, did apply to appearances of such candidates in film clips used in regularly scheduled TV newscasts, and that petitioner was, therefore, entitled to such equal time.

A number of bills were introduced in Congress to amend the Act to exempt various kinds of news programs from the equal time requirement. The Senate debated and passed an amendment to exempt appearances by candidates on newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions. Petitioner takes the position that only the newscasts are involved here because the Commission's ruling respecting his right to equal time concerned newscasts. The legislation under discussion, however, dealt with all the above listed types of news programs, and the public interest, presumably, would be equally broad. The House subsequently debated and passed an amendment which was generally similar to that passed by the Senate. The report, dated August 27, 1959, [1959 U.S. Code, Congres-

sional & Administrative News, No. 16, p. 3800] of the Conference Committee appointed to reconcile differences between the two amendments, was adopted by both Houses, and, on September 14, 1959, the President approved an amendment adding the following language to Section 315(a):

> Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscasts,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Previously the section had merely provided:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate.

Petitioner contests the Commission's assertion that the question has been rendered moot by passage of this legislation, because Congress also provided as follows:

> The Congress declares its intention to reexamine from time to time the amendment to section 315(a) of the Communications Act of 1934 by the first section of this Act, to ascertain whether such amendment has proved to be effective and practicable. [Pub. L. 86-274, §2]

Thus petitioner argues that the public demand consequent on his exposition of the TV Newscast issue would likely result in repeal of the amendment.

On July 26, 1959, after the Senate Committee had reported, but prior to floor debate on the Senate bill, CBS presented a program on the pending legislative proposals, including an editorial statement (of about five minutes duration) by CBS President, Dr. Frank Stanton, strongly favoring the legislation. In the course of the program, reference was made by CBS newscaster Howard K. Smith to the Commission's ruling on petitioner's claims to equal time in February, 1959. It does not appear from the record that any personal attack was made on the petitioner. The CBS announcer stated that CBS would provide time for presentation of opposing viewpoints. CBS did arrange to present Dr. Daniel M. Berman, Assistant Professor of Political Science, Washington College, Chestertown, Maryland; and Mr. Erich Hass, of the Socialist Labor Party. Several persons, in addition to petitioner, sought to appear in opposition to Dr. Stanton. Of these, CBS chose Dr. Timothy Costello, Assistant State Secretary of the Liberal Party of the State of New York. Dr. Berman, Mr. Hass and Dr. Costello appeared on a program on August 2, 1959. Petitioner argues that only Dr. Berman, who defended *in toto* the existing law, was a true opposition speaker, because Mr. Hass was willing to exempt film clips and tapes on regularly scheduled news broadcasts, and Dr. Costello was willing to exempt bona fide newscasts and on-the-spot news programs.

Meanwhile on July 30, 1959, petitioner had filed with the Commission, a "petition for interpretive ruling" and, on August 5, 1959, a supplementary petition, alleging that, as a directly invovled principal in the Commission's original ruling in February, 1959, petitioner was uniquely qualified to present the opposition position.

The Commission's views on editorializing by broadcast licensees comprehend devotion of a reasonable percentage of broadcasting time to discussion of public issues of interest so that

> . . . the public has a reasonable opportunity to hear opposing positions on the public issues of interest and importance in the community. [13 F.C.C. Reports pp. 1257-8]

CBS filed opposition pleadings to both of petitioner's petitions. Petitioner filed an addendum and a reply.

August 18, 1959, the Commission's Acting Chairman wrote petitioner's attorney that the Commission had concluded that CBS had fulfilled its obligation to provide "a fair and balanced presentation of an important public issue of a controversial nature."

On September 21, 1959, petitioner filed a "petition for reconsideration and reversal of order." CBS filed its opposition, to which petitioner filed an answer. March 24, 1960, the Commission denied reconsideration and this petition for review followed.

The Commission's own interpretation of its rule is the ultimate criterion and is entitled to controlling weight, unless it is plainly erroneous or inconsistent with the rule. *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 414 (1945). Our study of this case shows no basis for holding the Commission's instant interpretation of its rules on editorializing to be plainly erroneous or inconsistent.

We have considered with care all the arguments advanced by petitioner, and find them without merit. The relief sought by petitioner is DENIED.

APPENDIX II.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Thursday, January 12, 1961

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge

No. 13030
LAR DALY,
Petitioner,
v.
UNITED STATES OF AMERICA, and THE FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

Petition for Review of an Order and Directive of the Federal Communications Commission.

This cause came on to be heard on the petition for review of an order and directive of the Federal Communications Commission and the transcript of the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the relief sought by petitioner in the said petition for review of an order entered by the Federal Communications Commission on August 18, 1959, and directive of March 24, 1960, be, and the same is hereby, DENIED, in accordance with the opinion of this Court filed this day.

APPENDIX III.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, February 13, 1961

Before

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

No. 13030 LAR DALY, Petitioner, v. UNITED STATES OF AMERICA, and THE FEDERAL COMMUNICATIONS COMMISSION, Respondents.	Petition for Review of an Order and Directive of the Federal Communications Commission.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 19, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of the Petitioner's Brief and Appendix, filed September 14, 1960; Respondent's Brief and Appendix, filed November 15, 1960; Opinion, filed January 12, 1961; Judgment, entered January 12, 1961; Order Denying Petition For Rehearing, entered February 13, 1961 in:

Cause No. 13030

Lar Daly,

vs.

Federal Communications Commission,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this third day of May A.D. 1961.

(Seal)

/s/ Kenneth J. Carrick
Clerk of the United States Court of Appeals
for the Seventh Circuit.

APPENDIX IV.

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.
August 18, 1959

In Reply Refer To:
8422

Charles V. Falkenberg, Esq.
Falkenberg and Falkenberg
1664 La Salle Wacker Building
221 N. La Salle Street
Chicago 1, Illinois

Dear Mr. Falkenberg:

This is with reference to your request of July 28, 1959 that the Commission issue an "order" directing the Columbia Broadcasting System, Inc., (CBS) to afford your client, Lar Daly, equal time for the purpose of replying to the alleged one-sided editorializing by Mr. Frank Stanton, President of CBS, on the issue of "TV Newscast Equal Time Issue" when he appeared on that network's program "Behind the News-Section 315" on July 26, 1959. Your client bases his request on the Commission's policy that broadcasters are obligated to provide "fair and balanced presentation of an important public issue of a controversial nature." He contends that he should be afforded time to reply since he was directly involved in the Commission's original February 19, 1959 affirmation; and that he is the most qualified spokesman to present the opposing viewpoint.

CBS, in its reply, states, in substance, that on July 26 it presented a program devoted to Section 315 in which the Commission's recent decisions concerning the application of said section to newscasts and the proposals pending in Congress to change the laws were discussed; that about five minutes of the program consisted of Mr. Stanton's editorial statement; that on August 2 it presented another program that continued the discussion of Section 315 on which views were expressed opposing the position of CBS; that the participants on this program were selected from a number of individuals who had expressed desires to present opposing viewpoints; and that

the policies enunciated in the Commission's Report on Editorializing by Broadcast Licensees were followed. CBS points out that the judgment of CBS news in the selection of spokesmen opposed to the views expressed by Mr. Stanton was well founded and that the varying shades of opinion regarding changes in Section 315 were adequately and fairly presented. CBS argues that Lar Daly is not the issue—that the newscast question is the issue; that he was not attacked either in the editorial comment of CBS or in the analysis which preceded the editorial statement; and that CBS's editorial statement was also directed to Section 315 as a whole.

The Commission has given careful consideration to your request and concluded that on the basis of the facts before it, and in light of the views expressed in its letter of August 14, 1959 to you concerning a similar request, no action on its part is warranted. As indicated to you in said letter, where a licensee affords time over his facilities for the expression of views on a controversial issue of public importance he is under an obligation to insure that a reasonable opportunity is afforded for the expression over his facilities of opposing viewpoints. Unlike Section 315 of the Communications Act which relates to individuals, the Commission policy, in general, relates to issues. In the first instance, it is up to the licensee to determine whether the viewpoint of the requesting party has received a sufficient amount of broadcast time or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request.

It is clear that in the instant case, the newscast question, and not Lar Daly, is the controversial issue. Inasmuch as CBS presented several spokesmen on its August 2 program, all of whom appear qualified to oppose the views expressed by Mr. Stanton, it would appear that CBS has fulfilled its obligation to provide a "fair and balanced presentation of an important public issue of a controversial nature."

Sincerely yours,
Robert E. Lee
Acting Chairman

APPENDIX V.

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

85402
8422

March 24, 1960

Mr. Lar Daly
844 West Vermont Street
Chicago 43, Illinois

Dear Sir:

This is with reference to your petition filed on September 21, 1959, and subsequent pleadings, seeking reconsideration of the Commission's ruling of August 18, 1959 on your request that the Commission issue an "Order" directing the Columbia Broadcasting System to afford you equal time to reply to the editorializing by Mr. Frank Stanton, President of CBS, on the program "Behind the News-Section 315" presented by the network on July 26, 1959.

In your pleadings, you contend, in substance, that you should be afforded time to reply since you were "directly involved" in the Commission's interpretation of February 19, 1959 relating to the applicability of Section 315 of the Communications Act of 1934, as amended, to appearances by candidates for public office on TV newscasts, and in the Commission's Interpretive Opinion of June 15, 1959 relating to the same problem; that you were the most qualified spokesman to present the opposing viewpoints on the question; that legislation was pending in Congress to amend Section 315 of the Act to exempt the appearances of candidates on news and similar programs; and that it was important that the public should have an opportunity to be informed on both sides of the issue before Congress voted on the legislation in question.

In its opposition to your petition, CBS alleges, in substance, that on August 2, 1959 it presented a program which continued the discussion of the subject matter of the program on which Mr. Stanton appeared on July 26, 1959; that on said program CBS presented three speakers who expressed viewpoints opposed to that of

Mr. Stanton; and that you were not attacked over the air. The three speakers were: Dr. Daniel M. Berman, Assistant Professor of Political Science, Washington College, Chestertown, Maryland; Dr. Timothy Costello, Assistant Secretary of the Liberal Party of New York State; and Mr. Eric Haas of the Socialist Labor Party. You contend that two of the speakers on the August 2, 1959 program, Mr. Haas and Dr. Costello, favored the exemption of TV newscasts from the equal time requirements of Section 315, and thus supported the position of CBS; and that said program was not a true public presentation of the opposing viewpoint. This is disputed by CBS which asserts that the persons who appeared on the August 2, 1959 program did express points of view opposed to that of Mr. Stanton; and that the views expressed by all the speakers were at substantial variance with the position of CBS.

In its letter of August 18, 1959, the Commission stated, among other things, that in the instant case, it was the newscast question rather than you which was the controversial issue; that inasmuch as CBS presented several spokesmen on its August 2 program, all of whom appeared qualified to oppose Mr. Stanton, it would appear that CBS has fulfilled its obligation to provide a "fair and balanced presentation of an important public issue of a controversial nature."

The Commission has given careful consideration to your respective pleadings. It appears therefrom that no additional facts or arguments have been presented which would warrant the Commission in altering its ruling of August 18, 1959 on your complaint. The Commission believes that the views expressed in its letter still pertain. Accordingly, your petition for reconsideration is denied in all respects.

By Direction Of The Commission
Mary Jane Morris.
Secretary

cc: Charles V. Falkenberg
CBS
Leon R. Brooks
Benedict F. Fitzgerald, Jr.

APPENDIX VI.

PETITIONER'S "RELIEF REQUESTED" FROM FEDERAL COMMUNICATIONS COMMISSION IN HIS SEPTEMBER 21, 1959 "PETITION FOR RECONSIDERATION AND REVERSAL OF ORDER".

RELIEF REQUESTED.

(a) Petitioner requests the Commission to reverse its August 18, 1959 Ruling as being null and void in its entirety, and, in its place, issue an "Interpretive Opinion" strongly recommending that Columbia Broadcasting System, and specifically its chief administrative officer, Frank Stanton, afford Petitioner (Lar Daly) free 30 minutes use of its facilities, equal to that utilized by Frank Stanton and other CBS personnel on July 26, 1959, to present to the American people a *genuine* explanation of the "other side" of the controversial "TV Newscast" issue, wherein CBS will thus truly and actually "fulfill its obligation" of providing a fair and balanced presentation of an important public issue of a controversial nature. By so doing, Petitioner is hopeful that CBS will comply with the "strong recommendation" of the Commission, and not refuse to comply by claiming that the Commission cannot "order" it to do so.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 229

LAR DALY, *Petitioner*

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 286 F. 2d 146. The two rulings of the Federal Communications Commission (Pet. App. 9a-12a) have not been officially reported, but its ruling denying reconsideration of the original ruling is reported unofficially at 19 Pike & Fischer, Radio Regulation[1] 1103.

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[1] Hereinafter referred to as "Radio Reg."

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961 (Pet. App. 6a). Rehearing was denied on February 13, 1961 (Pet. App. 7a). By orders of Mr. Justice Clark, dated May 12 and June 12, 1961, the time for filing a petition for certiorari was extended to July 13, 1961. The petition for a writ of certiorari was filed on July 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed orders of the Federal Communications Commission holding that its requirement that broadcasting stations provide a fair and balanced presentation of important public issues did not entitle petitioner to be among those chosen by the Columbia Broadcasting System to respond to an editorial statement with respect to a possible amendment of the Communications Act.

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a) (Supp. II), reads as follows:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its sta-

tion by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

On February 19, 1959, the Federal Communications Commission ruled that Section 315 (a) of the Communications Act, as it then read,[2] entitled petitioner Lar Daly, a primary candidate for the office of Mayor

[2] Public Law 86-274, 73 Stat. 557, effective September 14, 1959, added the last two sentences in Section 315 (a), *supra*, which exempt newscasts, news interviews, news documentaries, and on-the-spot coverage of news events from the licensee's obligation to afford equal opportunities in the use of his station to legally qualified candidates for public office. Prior to the amendment, Section 315 (a) consisted only of the first two sentences set forth above.

of Chicago, to "equal opportunities" in the use of certain Chicago television broadcast stations, because of the appearance of opposing candidates in film clips shown on regularly scheduled newscasts on those stations. *CBS, Inc.*, 18 Radio Reg. 238. On June 17, 1959, the Commission issued an "Interpretive Opinion" denying petitions for reconsideration of its February 19th ruling and explaining the basis for its construction of Section 315 (a). *CBS, Inc.*, 26 F.C.C. 715, 18 Radio Reg. 701.

Shortly after the Commission's first ruling, a number of bills were introduced in Congress to amend Section 315 (a) to exempt various kinds of news programs from the "equal opportunities" requirement. Hearings on these bills were held in late June and early July of 1959.[3] On July 22, 1959, the Senate Committee on Interstate and Foreign Commerce reported favorably a bill which proposed to exempt from the "equal opportunities" requirement appearances by candidates on newscasts, news interviews, news documentaries, on-the-spot coverage of news events and panel discussions. S. Rep. No. 562, 86th Cong., 1st Sess. This bill was debated, amended and passed by the Senate on July 28, 1959. 105 Cong. Rec. 14438-14463.

On July 26, 1959, the Columbia Broadcasting System Television Network (CBS) presented a program entitled "Behind the News with Howard K. Smith," which was devoted to Section 315, the Commission's

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[3] Hearings on S. 1585, 1604, 1858 and 1929 before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959); Hearings on H.R. 5389, 5675, 6326, 7122, 7180, 7206, 7602 and 7985 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959).

recent rulings on newscasts, and the pending legislative proposals (R. 23-28;[4] see Pet. App. 4a, 9a, 11a). The program included an editorial statement by Dr. Frank Stanton, President of CBS, who urged enactment of the legislation recommended by the Senate committee (R. 37, 38; see Pet. App. 4a). At the close of the program, the announcer stated (R. 38; see Pet. App. 4a): "The CBS Television Network will provide time next week for the presentation of opposing viewpoints to that taken in the CBS editorial broadcast by Dr. Frank Stanton today."

In preparation for this program, CBS had, on its own initiative, arranged for the subsequent appearance of Dr. Daniel M. Berman, Assistant Professor of Political Science, Washington College, Chestertown, Maryland, and Mr. Erich Hass of the Socialist Labor Party to present views in opposition to those expressed by Dr. Stanton (R. 17-18; see Pet. App. 4a, 11a-12a). Following the program of July 26, 1959, CBS received requests for an opportunity to appear in opposition to Dr. Stanton's statement from petitioner Lar Daly and from six other persons or organizations (R. 18; see Pet. App. 4a). From this group CBS selected Dr. Timothy Costello, Assistant State Secretary of the Liberal Party of the State of New York, as a third representative of an opposing viewpoint.[5]

On August 2, 1959, after the Senate had passed a bill, but before any action by the House, CBS pre-

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[4] "R." refers to the record filed in the court of appeals.

[5] CBS stated that it did not permit all who expressed a desire to reply to Dr. Stanton to appear because, in its view, "a meaningful and informative program would have been impractical, if not impossible, were all requesters to appear and express their viewpoints on the second program" (R. 18).

sented its second program on Section 315. Dr. Berman took a position entirely contrary to that of Dr. Stanton and defended *in toto* the then existing law, as it had been interpreted by the Commission (R. 53, 54; see Pet. App. 4a, 12a). The other two participants agreed with Dr. Stanton that newscasts should be exempted from Section 315's requirement of "equal opportunities", but in the main[6] opposed the exemption of other news programs provided for in the pending legislation (R. 46, 50; see Pet. App. 4a, 12a).

Meanwhile, on July 30, 1959, petitioner Daly had filed with the Commission a "Petition for Interpretive Ruling Forthwith" (R. 2-4) and, on August 5, 1959, a supplementary petition, alleging that he was uniquely qualified to present the opposition position and requesting that the Commission direct CBS to provide him equal time to oppose Dr. Stanton's views at a date later in August (R. 8-12; Pet. App. 5a). In support of his requests, petitioner cited the Commission's *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), 1 Radio Reg. (Part 3) 91:201 (set forth in pertinent part in the Appendix, *infra*, pp. 11-16), which declares that broadcast licensees have an obligation under the public interest standard of the Communications Act to "devote a reasonable percentage of their broadcasting time to the discussion of public issues * * *" in such a manner that "the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community." 13 F.C.C. at 1257-1258, par.

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[6] Dr. Costello also favored exemption of on-the-spot coverage of news events (R. 50; see Pet. App. 4a).

21, 1 Radio Reg. (Part 3) at 91:211, par. 21 (App., *infra*, p. 16).[7] On August 16, 1959, in reply to pleadings filed by CBS, petitioner urged that the CBS program of August 2d had not fairly presented the opposition side and that a further reply to Dr. Stanton by Mr. Daly was required (R. 61; see Pet. App. 4a, 12a).

By letter dated August 18, 1959, the Commission advised petitioner of its conclusions that CBS had fulfilled its obligation to provide "a fair and balanced presentation of an important public issue of a controversial nature" within the meaning of the *Report on Editorializing* and that no action on the part of the Commission was warranted (Pet. App. 9a-10a). In rejecting petitioner's contention that a fair presentation could not be achieved without including him as the allegedly "most qualified spokesman," the Commission stated that the controversial issue was "the newscast question, and not Lar Daly" and that the participants in the August 2d program of CBS appeared "qualified to oppose the views expressed by Mr. Stanton" (Pet. App. 10a). On March 24, 1960, after Section 315(a) had been amended, the Commission by letter denied petitioner's request for reconsideration (Pet. App. 11a-12a).

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[7] The *Report on Editorializing* further states that although "no one all embracing formula" can be applied in selecting spokesmen for the various viewpoints to be expressed on a controversial question, a licensee in some circumstances may be required to consider the "personal involvement" of persons in the controversy, since "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F.C.C. at 1251-1252, par. 10, 1 Radio Reg. (Part 3) at 91:206, par 10 (App., *infra*, pp. [redacted]).

On petition for review, the court of appeals denied (Pet. App. 1a-5a) petitioner's request for a judicial determination that the Commission's rulings of August 18, 1959, and March 24, 1960, were "unlawful, erroneous and invalid and should be enjoined, set aside, annulled, and suspended" (Pet. App. 1a). Noting (Pet. App. 4a) that it did "not appear from the record that any personal attack was made on the petitioner," the court stated that it had "considered with care all the arguments advanced by petitioner" and found them "without merit" (Pet. App. 5a). With respect to the Commission's conclusion that CBS had fulfilled its obligation to provide a fair and balanced presentation of conflicting views on a controversial issue of public importance, the court stated (Pet. App. 5a): "Our study of this case shows no basis for holding the Commission's instant interpretation of its rules on editorializing to be plainly erroneous or inconsistent."

ARGUMENT

The petition presents no important question of law warranting disposition by this Court. On the contrary, the question presented turns on the particular facts and lacks general importance.

Petitioner's contention (Pet. 15-18) that the Commission and the court below misapplied the standard set forth in the Commission's *Report on Editorializing by Broadcast Licensees* rests on petitioner's belief that the first CBS program involved principally the newscast question and that petitioner, because of the Commission's previous ruling in his favor under Section 315 (a) (*CBS, Inc., supra*), was a required participant. But the CBS program went beyond the narrow question of newscasts and concerned all of the various pro-

posed changes in Section 315 (a). Furthermore, the controversial issue worthy of public discussion was the proposed change in the law and its effect nationwide, rather than a personal dispute between CBS and petitioner. It was not necessary to a "fair and balanced" discussion of the issues to include petitioner among the qualified persons selected to present varying viewpoints, merely because the so-called "Lar Daly case" (*CBS, Inc., supra*) had precipitated the controversy.

In any event, petitioner presents no question requiring resolution by this Court. As petitioner has conceded (Pet. 2-3), the court below accorded the proper weight to agency's interpretation of its own policy pronouncements. The correctness of the application of that policy to the particular facts of this case has been reviewed by the court below and raises no issue for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Assistant General Counsel,

RUTH V. REEL,
Counsel,
Federal Communications Commission.

AUGUST 1961.

APPENDIX

The pertinent provisions of the Commission's *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), 1 Radio Reg. (Part 3) 91:201, are as follows:

* * * * * *

6. It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radio-broadcasting. Unquestionably, then, the standard of pubic interest, convenience and necessity as applied to radio-broadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.[2] It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broad-

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[2] Cf. *Thornhill* v. *Alabama*, 310 U.S. 88, 95, 102; *Associated Press* v. *United States*, 326 U.S. 1, 20.

cast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

7. This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by this Commission in a long series of decisions. The *United Broadcasting Company* (WHKC) case, 10 FCC 675, emphasized that this duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof. The *Scott* case, 3 Pike & Fischer RR 259, stated our conclusions that this duty extends to all subjects of substantial importance to the community coming within the scope of free discussion under the First Amendment without regard to personal views and opinions of the licensees on the matter, or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience. Cf. *National Broadcasting Company* v. *United States*, 319 U.S. 190; *Allen T. Simmons*, 3 Pike & Fischer RR 1029, affirmed, *Simmons* v. *Federal Communications Commission*, 169 F. (2d) 670, certiorari denied, 335 U.S. 846; *Bay State Beacon*, 3 Pike & Fischer RR 1455, affirmed, *Bay State Beacon* v. *Federal Communications Commission*, U.S. App. D.C., decided December 20, 1948; *Petition of Sam Morris*, 3 Pike & Fischer RR 154; *Thomas N. Beach*, 3 Pike & Fischer RR 1784. And the Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fair-

ness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. *Mayflower Broadcasting Co.*, 8 F.C.C. 333; *United Broadcasting Co.* (WHKC) 10 F.C.C. 515; cf. *WBNX Broadcasting Co., Inc.* 4 Pike & Fischer RR 244 (Memorandum Opinion). Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.

8. It has been suggested in the course of the hearings that licensees have an affirmative obligation to insure fair presentation of all sides of any controversial issue before any time may be allocated to the discussion or consideration of the matter. On the other hand, arguments have been advanced in support of the proposition that the licensee's sole obligation to the public is to refrain from suppressing or excluding any responsible point of view from access to the radio. We are of the opinion, however, that any rigid requirement that licensees adhere to either of these extreme prescriptions for proper station programming techniques would seriously limit the ability of licensees to serve the public interest. Forums and roundtable discussions, while often excellent techniques of presenting a fair cross section of differing viewpoints on a given issue, are not the only appropriate devices for radio discussion, and in

some circumstances may not be particularly appropriate or advantageous. Moreover, in many instances the primary "controversy" will be whether or not the particular problem should be discussed at all; in such circumstances, where the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presentation by refusing to broadcast its position. Fairness, in such circumstances might require no more than that the licensee make a reasonable effort to secure responsible representation of the particular position and, if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to reply to present their contrary opinion. It should be remembered, moreover that discussion of public issues will not necessarily be confined to questions which are obviously controversial in nature, and, in many cases, programs initiated with no thought on the part of the licensee of their possibly controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views. In such cases, however, fairness can be preserved without undue difficulty since the facilities of the station can be made available to the spokesmen for the groups wishing to state views in opposition to those expressed in the original presentation when such opposition becomes manifest.

9. We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a

demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourge and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

10. It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of

view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.

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21. To recapitulate, the Commission believes that under the American system of broadcasting the individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. * * *

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